

DEPARTMENT OF MANAGED HEALTH CARE

ADOPTION OF EMERGENCY REGULATIONS

California Code of Regulations
Title 28, Article 7, Section 1300.67.02

Transfer of Enrollees Pursuant to a Public Health Order

(Control No. 2021-TRFR)

AUTHORITY

Under the authority established in the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act),¹ specifically Health and Safety Code Sections 1341, 1343, 1344, 1367, 1367.01, 1367.03, and Government Code section 8550 *et seq.*, the Director of the Department of Managed Health Care (Department) proposes to adopt as an emergency regulation section 1300.67.02, “Transfer of Enrollees Pursuant to a Public Health Order,” located in Title 28 of the California Code of Regulations (CCR).

REFERENCE

This regulation is intended to implement, interpret, and/or make specific Health and Safety Code Sections 1367, 1367.01, 1367.03, and Government Code section 8550, *et seq.*

NON-DELAY STATEMENT

The Director of the Department has determined the emergency situation addressed by this proposed emergency regulation clearly poses such an immediate and serious harm that delaying action to allow public comment would be inconsistent with the public interest.

Accordingly, the Department did not provide a five-day public notice period prior to submitting the proposed emergency regulation to the Office of Administrative Law. The Department requests the Office of Administrative Law similarly waive its typical five-day notice period.

Time is of the essence in this instance because the State of California is in the midst of a global pandemic due to the SARS-CoV-2 virus, which causes COVID-19. California

¹ California Health and Safety Code sections 1340, *et seq.* References herein to “Section” are to sections of the Knox-Keene Act unless otherwise specified.

has 2,518,611 cases of COVID-19, and California has 28,045 deaths resulting from COVID-19.² Both of these numbers are rising at an alarming rate every day, taxing the already overburdened California hospital system. According to the most recent data available from the California Department of Public Health, there are 21,128 patients hospitalized in California with COVID-19. Approximately 4,584 of those patients are in the Intensive Care Unit (ICU). Another 875 patients are hospitalized with suspected COVID-19 and 87 are in the ICU.

The ability to transfer patients from one facility to another facility is essential because the hospital situation throughout California is dire and this emergency regulation is crucial to ensure hospitals are able to handle the influx of patients and enrollees are able to receive access to medically necessary services. Any delay in the promulgation of this regulation will exacerbate the already dire situation within the California hospital system and potentially lead to enrollees being unable to access medically necessary services in a hospital setting.

FINDING OF EMERGENCY

The Director of the Department has determined an emergency exists. Immediate action is necessary to avoid serious harm to the public health and safety.

On January 31, 2020, the United States Department of Health and Human Services Secretary Alex A. Azar declared a public health emergency for the United States to aid the nation's healthcare community in responding to the coronavirus disease (COVID-19). The United States Centers for Disease Control and Prevention (CDC) has declared COVID-19 a worldwide pandemic due to its global effect. On March 13, 2020, President Donald Trump invoked the Stafford Act and declared a national emergency regarding the COVID-19 outbreak.

On March 4, 2020, Governor Gavin Newsom declared an emergency in the state of California in response to the outbreak of respiratory illness due to the novel coronavirus known as COVID-19. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, a stay-at-home order to protect Californians. The order mandates all residents heed current public health directives.

As of January 8, 2021, California has 2,518,611 cases of COVID-19, and California has 28,045 deaths resulting from COVID-19. Both of these numbers are rising at an alarming rate every day, taxing the already overburdened California hospital system. According to the most recent data available from the California Department of Public Health, there are 21,128 patients hospitalized in California with COVID-19. Approximately 4,584 of those patients are in the Intensive Care Unit (ICU). Another 875 patients are hospitalized with suspected COVID-19 and 87 are in the ICU.³

² This data is current as of January 8, 2021, 10:50am, as reported by: <https://covid19.ca.gov/>.

³ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#>.

Statewide, COVID-19 hospitalizations have increased sevenfold over the last two months, while COVID-19 Intensive Care Unit (ICU) hospitalizations have increased by over sixfold over the last two months.⁴ This increase has led to a large numbers of California hospitals having a significant strain on their ability to provide adequate medical care to patients in their region. Certain hospitals in Los Angeles County have declared internal disasters, closing the hospitals off from the arrival of patients from any incoming ambulances.⁵ The current distribution of COVID-19 hospitalizations is focused in some regions and hospitals, and the burden of care needs to be moved among statewide healthcare resources. If this increase of COVID-19 patients continues, hospitals may be unable to provide necessary emergency and critical care to Californians.

The proposed emergency regulation is necessary to ensure appropriate transfer of patients between healthcare facilities to address the current surge of COVID-19 cases and to take appropriate responsive measures to ensure medically necessary services are available to patients throughout California.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Under existing law, the Knox-Keene Act provides for the licensure and regulation of health plans by the Department and makes a willful violation of the Knox-Keene Act a crime. The Knox-Keene Act requires health care service plans to provide all basic health care services, to make services readily available at reasonable times, to employ and utilize the allied health workforce to provide services, and to furnish services in a manner providing continuity of care and ready referral of patients, consistent with good professional practice.

As stated above, California is currently experiencing an unprecedented and exponential surge in COVID-19 cases, and staffing and other resources of hospitals are becoming strained. This surge is causing many hospitals in the state to meet or exceed their usual capacity to serve patients, which can jeopardize the health and lives of the patients and staff. Over the past seven days, an average of 37,845 COVID-19 cases have been reported each day. On January 4, 2021, California reported its highest 1-day total of more than 70,000 COVID-19 cases.⁶ Over the next three weeks, another 6,286

⁴ https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Hospital-Surge_1-5-2021.aspx.

⁵ <https://www.latimes.com/california/story/2020-12-29/oxygen-supply-shortages-bedevil-hospitals-already-overwhelmed-by-covid-19-patients>.

⁶ https://www.sfchronicle.com/bayarea/article/California-cases-level-off-ahead-of-expected15846093.php?utm_campaign=CHL%3A%20Daily%20Edition&utm_medium=email&hsmi=105387265&hsenc=p2ANqtz_FnCcuJd292IQYevN0dVIIWYvG2pCt8BKVZItCGwq981stSMJSrc5EA3myLZ49Yf1OdyQqrWib4C1uUwbT5dEus9w&utm_content=105387265&utm_source=hs_email.

Californians are projected to die from COVID-19, according to the state's epidemiological forecasts.⁷

Accordingly, to provide medically necessary care to all patients in need, it is imperative to maximize the capacity of hospitals in the state by allowing for the expeditious transfer of patients from the most highly impacted hospitals to hospitals with more available capacity. This regional approach is central to an ethical and equitable response to the COVID-19 pandemic. Health plan prior authorization requirements for transfers between hospitals can cause unnecessary delays in effectuating such transfers. This emergency regulation is necessary to address how health plans shall coordinate the transfer of patients between hospitals due to the surge of COVID-19 patients currently destabilizing healthcare resources in certain regions of California.

SPECIFIC PURPOSE AND NECESSITY OF THE PROPOSED EMERGENCY REGULATION

Subdivision (a) is added to clarify the applicability of the regulation by specifying it pertains to full-service health plans offering group or individual coverage, including grandfathered health plans. This subdivision specifies that Medi-Cal managed care health plans are not subject to the proposed regulation. This provision is necessary to ensure health plans understand the scope of the proposed regulation to ensure compliance.

Subdivision (b) is necessary to define key terms in the proposed regulation. It is necessary to ensure clarity and consistent application of the proposed regulation, and to ensure health plans understand the scope of the proposed regulation to ensure compliance.

Subdivision (b)(1) is necessary to define covered public health order to ensure health plans clearly understand the scope of the emergency regulation and the applicable situation in which it pertains to their procedures and practices.

Subdivision (b)(2) is necessary to define transferring facility, which is a key term used throughout the emergency regulation and ensures that health plans understand when enrollees shall be moved from a transferring facility to ensure they receive appropriate medically necessary care.

Subdivision (b)(3) is necessary to define receiving facility, which is a key term used throughout the emergency regulation and ensures that health plans understand when enrollees shall be moved to a receiving facility to ensure they are able to obtain coverage for appropriate medically necessary care.

Subdivision (c) specifies what must occur when a health plan transfers an enrollee to the receiving facility. This is necessary to ensure the health plan understands what

⁷ <https://calmatters.org/health/coronavirus/2021/01/california-hospitals-covid-cases/>.

must occur to comply with the regulation in situations where an enrollee is transferred from one facility to another facility.

Subdivision (c)(1) is necessary to instruct health plans regarding the transfer of an enrollee to a facility and what is prohibited under the regulation. This provision makes specific that the health plan may not delay based on prior authorization, prior notice, or any other requirements that delay or prevent the transfer of the enrollee.

Subdivision (c)(2) makes specific that the health plan is responsible for the coverage of medically necessary costs of moving the enrollee between the transferring facility and the receiving facility to ensure the facilities receive reimbursement for these medically necessary services provided to health plan enrollees.

Subdivision (c)(3) is necessary to instruct the health plans that they are responsible for reimbursement of medically necessary services rendered by the receiving facility within the first 72 hours of the enrollee's transfer. This provision is necessary to ensure that the enrollee receives these services and the facility is properly reimbursed to providing the services.

Subdivision (c)(4) clarifies the circumstances in which the health plan shall reimburse a receiving facility for medically necessary services provided to an enrollee during the first 72 hours after the enrollee is transferred. This ensures that the receiving facility is properly reimbursed for medically necessary services provided to the enrollee.

Subdivision (c)(4)(A) makes specific that the receiving facility shall notify the health plan of the transfer of the enrollee. This provision clarifies what must occur to ensure the health plan is aware that an enrollee has been transferred and is receiving medically necessary services at a receiving facility.

Subdivision (c)(4)(B) makes specific that the health plan shall continue reimbursement to the receiving facility after the first 72 hours if the health plan does not disapprove the services being provided at the receiving facility. The subdivision clarifies that if the health plan disapproves the services being provided at a receiving facility, the health plan shall reimburse the receiving facility until such point as the health plan effectuates the transfer of the enrollee to a different facility or the enrollee is discharged. This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensures the receiving facility is properly reimbursed for providing medically necessary services.

Subdivision (c)(5) is necessary to clarify the payment amount by the health plan for medically necessary services provided by the receiving facility if the receiving facility has a contract with the health plan. This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (c)(6) specifies the required payment amount by the health plan for medically necessary services provided by the receiving facility if the receiving facility does not have a contract with the health plan, which is the reasonable and customary rate. This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (c)(7) specifies that the reasonable and customary rate shall be the rate required under title 28, section 1300.71(a)(3)(B). This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (d) specifies an enrollee shall be liable for no more than the in-network cost the enrollee would have been responsible for had the enrollee not been moved to a receiving facility. This provision is necessary to ensure the enrollee is not financially harmed from being moved from a transferring facility to a receiving facility.

BROAD OBJECTIVES AND BENEFITS OF THE PROPOSED EMERGENCY REGULATION

Pursuant to Government Code section 11346.5(a)(3)(C), the broad objectives and benefits of this proposed regulation, are to ensure appropriate transfer of patients between healthcare facilities to address the current surge of COVID-19 cases and to take appropriate responsive measures to ensure medically necessary services are available to patients throughout California.

This regulation specifies that pursuant to a state order, health plans shall coordinate the transfer of patients between hospitals due to the surge of COVID-19 patients currently destabilizing healthcare resources in certain regions of California. The regulation will have the benefit of preventing health plan prior authorization requirements for the transfer of enrollees between hospitals from causing unnecessary delays. This emergency regulation is necessary to address how health plans shall coordinate the transfer of patients between hospitals due to the surge of COVID-19 patients currently destabilizing healthcare resources in certain regions of California.

DOCUMENTS RELIED UPON

- Executive Department, State of California, Proclamation of a State of Emergency, published March 4, 2020.
- Executive Department, State of California, Executive Order N-33-20, dated March 19, 2020. CDC FAQs, available at www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread.
- California Department of Public Health, State of California, published January 5, 2021, available at www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Hospital-Surge_1-5-2021.aspx.

FISCAL IMPACT

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The proposed regulation does not impose a mandate on local agencies and school districts. No other direct or indirect costs or savings to local agencies or school districts required to be reimbursed under Part 7 (commencing with section 17500) of Division 4 of the Government Code, or other non-discretionary costs or savings imposed on local agencies are applicable. There is no direct cost or savings in federal funding to the state.

COSTS OR SAVINGS TO STATE AGENCY

There are no costs or savings to a state agency as a result of the proposed regulation.

COSTS OR SAVINGS IN FEDERAL FUNDING

Pursuant to Government Code section 11346.5, subdivision (a)(6), the Department has determined that this regulation will have no direct cost or savings in federal funding to the state.

CONSISTENCY WITH STATE LAW

Pursuant to Government Code section 11346.5, subdivision (a)(3)(D), the proposed regulation was evaluated with existing law, including sections 1367 and 1367.01 of the Knox-Keene Act, and was not found to be inconsistent pursuant to Government Code section 11346.5 or incompatible with existing state regulations contained in Title 28 of the California Code of Regulations.

COMPARABLE FEDERAL LAW

The proposed regulation is not inconsistent with comparable federal law. The emergency regulation proposed in this action pertains to how health plans shall coordinate the transfer of patients between hospitals due to the surge of COVID-19 patients currently destabilizing healthcare resources in certain regions of California.

DETERMINATION

The Department has not identified any reasonable alternative nor has any stakeholder brought to the attention of the Department any alternative that would be more effective in carrying out the purpose for which the above action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed action.

REQUIRED NOTICE OF PROPOSED EMERGENCY RULEMAKING ACTION

This statement confirms that the Department complied with the requirement to provide notice of the proposed emergency action pursuant to Government Code section 11346.1, subdivision (a)(2).

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